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IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA

**PETITION TO AMEND RULE 5(d)
AND RULE 10(a), ARIZONA RULES
OF PROCEDURE FOR EVICTION
ACTIONS**

Supreme Court No. R-19-0018

**Comment in Opposition to the
Amendment of Rules 5 and 10 of the
Arizona Rules of Procedure for Eviction
Actions**

Pursuant to Rule 28, Rules of the Supreme Court, the Arizona Multihousing Association (“AMA”) respectfully comments in opposition to the January 10, 2019 petition by the Legal Services Committee of the State Bar to amend Rules 5(d) and 10(a) of the Rules of Procedure for Eviction Actions (“Proposal”) for the following reasons:

1. The Proposal seeks to compel landlords to file volumes of documents with their complaints which will result in a substantial waste of time, resources, and money. If adopted, a landlord would be required to file, in addition to the documents currently required to be filed under existing rules, a copy of the following documents: (a) the entire lease agreement; (b) copy of all exhibits the landlord intends to introduce or rely on in the action; (c) a copy of all addendums to the lease; and (d) a copy of the ledger for the past six months. The additional documents sought to be included in the filing would easily equate to an additional one hundred (100) pages of documents that would needlessly increase the cost and labor expended in processing, filing, and serving eviction actions filed on behalf of landlords.

1 2. The Proposal compels landlords to file with the court and serve the defendant with
2 documents that contain confidential and sensitive information that is not likely to result in
3 any tangible benefit to the Defendant and information that, if intercepted by a third party,
4 could cause financial harm to the defendant sought to be protected by the Proposal.

5 3. The additional documents sought to be produced and filed with the Summons and
6 Complaint will result in an increase in costs in the action, both filing fees and process server
7 fees, and will invariably lead to an increase in attorneys' fees.

8 4. The Proposal seeks to impose severe sanctions on a landlord whom intentionally or
9 unintentionally violates the Proposal, absent a showing of good cause, and assumes that the
10 landlord, pro se or represented by an attorney, will know, with absolute certainty, the issues
11 to be litigated, even in the absence of an answer from the defendant.

12 5. The Proposal, much like the current version of Rule 10 of the Rules of Procedure
13 for Eviction Actions, lacks a reciprocal obligation for the defendant to provide disclosure
14 to the landlord, rendering an unequal playing field.

15 6. The Proposal, with respect to Rule 10(a) provides an inconsistency with Rule 5(d)-
16 (e). Rule 10(a), as proposed, affords the opportunity to provide additional disclosures that
17 were not included in the complaint. This proposed amendment stands in opposition to the
18 mandate set forth in Rule 5(d) that "the documents and exhibits the plaintiff intends to
19 present or rely upon at trial shall be served with the complaint." This inconsistency is not
20 easily resolved and will lead to confusion and unnecessary exclusion of pertinent evidence
21 from eviction actions.
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23 24 **I. STATEMENT OF INTEREST**

25 The Arizona Multihousing Association is a professional trade association representing over
26 2,200 members and over 270,000 rental units in the State of Arizona. Its members include owners
27 of large multi-family properties, property management companies, developers, individual rental

1 owners and the vendors that serve this vital industry. The Association was formed in 1966 to
2 promote industry professionalism, create educational opportunities and engage in government
3 relations.

4 As the industry's trade organization, the Association has a vested interest in improving
5 landlord-tenant relationships.

6 **II. BACKGROUND ON PROPOSAL**

7 The Rules of Procedure for Eviction Actions ("RPEA") were drafted by the Arizona State
8 Bar/Tenant Task Force Rules Committee between 2007 and 2009. The committee included
9 various members from Community Legal Services and advocates for tenant rights. The committee
10 lacked any significant representation from the landlord bar. The result of this committee is the
11 RPEA as it exists today.

12 In reviewing the Proposal, there is no specific problem identified in the Proposal. Instead,
13 the Proposal asserts that there are problems inherent in the process that result in a disadvantage
14 to defendants. The Proposal assumes, wrongly, that defendants require a copy of the lease, the
15 ledger, all exhibits to be introduced at trial, and the ledger for the past six (6) months before even
16 appearing at the eviction hearing. The Proposal attempts to argue that the most vulnerable
17 population are defendants with rent subsidies and argues that greater protections should be
18 afforded to these persons. As noble as this may seem, it ignores the protections already existing
19 in the law and ignores the realities of these eviction actions, a vast majority of which result in the
20 named defendant failing to appear or otherwise respond to the eviction action. How and why
21 there will be any meaningful change in the outcome of these evictions, given the significant rate of
22 default, should these proposed amendments be affirmed is not answered by the proponent of this
23 Proposal, nor can it be. Under the guise of protecting a small segment of the evictions involving
24 subsidized housing, the Proposal needlessly encumbers the eviction process, significantly
25 increasing the volumes of documents required to be filed with the court which will lead to the
26 increase in attorney's fees and charges for service of process. Additionally, this new requirement
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1 will overwhelm the court itself, resulting in the need to hire additional court clerks and, ultimately,
2 lead to the increase in filing fees to cover the increase in costs related to the processing of these
3 evictions. In the end, the proposal that seeks to assist the financially stressed defendant seeks to
4 change the rules in a way that will increase costs per eviction of anywhere between \$50.00 to
5 \$200.00, thereby further hurting the defendant and making it even more difficult, in the case of a
6 non-payment of rent matter, to cure the breach in the manner set forth in A.R.S. § 33-1368(B).

7 **III. POINTS OF OPPOSITION**

8 **a. THE PROPOSAL WILL NEEDLESSLY REQUIRE A MASS** 9 **PRODUCTION OF DOCUMENTS.**

10 While there exists no formal requirements for a lease concerning a residential dwelling unit,
11 there are various statutory requirements that must be met by a landlord which will be triggered by
12 this mass disclosure rule. For example, A.R.S. § 33-1319 requires landlords to provide “educational
13 materials” to its defendants on matters concerning bed bugs and bed bug controls. Under the
14 Proposal, even if the matter was not concerning bed bugs, the landlord would be required to
15 furnish a copy of its Bed Bug Addendum along with its Complaint, needlessly expanding the size
16 of the litigation file. As another example, under A.R.S. § 33-1314.01, a landlord seeking to charge
17 separately for water, gas, wastewater, solid waste removal, or electricity is required to provide for
18 such a charge in the rental agreement and provide certain disclosures required by A.R.S. § 33-
19 1314.01(E). Under this Proposal, if the case filed were to involve a material non-compliance with
20 the lease, the utility addendum would be required to be disclosed. *See* Proposed Rule 5(d)(3). This
21 disclosure would be irrelevant to the allegations in the Complaint but would be required to be
22 disclosed under the Proposal

23
24 Aside from the fact that the drafters of this Proposal do not understand that the average
25 lease in Arizona, inclusive of addendums is over 30 pages in length, the effect of this Proposal is
26 to require disclosure of documents that could serve no purpose in the eviction action. The
27 Proposal does not allow for there to be any modifications of the disclosures to fit the case

1 presented to the court. With regards to the lease and addendums, the landlord will be required to
2 disclose all of these documents, regardless of whether or not the addendums are invoked by the
3 allegations in the complaint. This will result in needless additional costs incurred in an action with
4 no tangible benefit for any party in the case.

5 In its comment to the Proposal, the Commission on Access to Justice (“CAJ”) submitted
6 its comment to the Proposal, analyzing the pitfalls and benefits to the Proposal. CAJ identified a
7 significant fact that supports the opposition to this Proposal. The CAJ identified that 85-90
8 percent of all evictions are premised on a violation of A.R.S. § 33-1368(B). With this statistic, it
9 seems illogical to require additional disclosures of addendums such as the Crime-Free Addendum,
10 Community Rules & Regulations, Pet Addendum, Satellite Dish Addendum, etc. in a non-payment
11 of rent case. These additional needless disclosures will provide no benefit to the parties yet will
12 burden each by additional costs related to the eviction action and interferes with the landlord’s
13 ability to present only that evidence which is necessary to prove its case.

14 In addition to the disclosure of irrelevant documents, the Proposal ignores the reality in
15 that a vast majority of evictions proceed by default. That is to say that thousands of the cases
16 affected by this Proposal will not experience any benefit. Landlords will be required to pay and
17 prepare for the disclosure of volumes of pages of documents with the court, only to pass said
18 increases in costs onto the defendant. Landlords will experience additional costs related to the
19 collating, copying, and filing of these documents with the court and the court will incur an
20 additional burden as indicated in comment filed by the Honorable Keith Russell on behalf of the
21 Maricopa County Justice Courts. These additional burdens and costs that are guaranteed to be
22 incurred are not outweighed by any benefit the defendant obtains from this Proposal. To the
23 contrary, this Proposal will harm the defendant with additional costs and will needlessly clog the
24 judicial system with millions of extraneous documents and further complicate the eviction process.

25 Rather than specify the exact problem and provide a narrowly tailored solution, the
26 Proposal seeks to transform the way evictions are handled by burdening the court and landlords
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1 with intensive, obtrusive, and needless disclosure requirements. The drafters of the Proposal have
2 provided no argument as to why the disclosure requirement in Rule 10, RPEA, is insufficient or
3 provide any meaningful support for the contention that defendants will be better able to defend
4 themselves with these disclosures ahead of the initial hearing.

5 **b. THE PROPOSAL CREATES THE RISK OF DISCLOSING SENSITIVE**
6 **PERSONAL INFORMATION**

7 The Proposal seeks to have landlords file volumes of documents with the court and serve
8 same on the defendant. The Proposal fails to take into consideration the potential for the
9 dissemination of a defendant's personal information and the risk that such a dissemination will
10 result in financial injury for the defendant.

11 The Proposal seeks to add the entire lease and addendum packet to the lease file. Often
12 times, a landlord will include dates of birth or social security numbers for the occupants or lease
13 holders to the lease. Under this Proposal, this sensitive information would be free for the taking.¹
14 If the argument as to sensitive information concerning the lease was not controlling enough what
15 about a case concerning a material falsification of an application? The defendant may very well
16 not want to contest the action but, nevertheless, all of the exhibits the landlord seeks to introduce
17 at trial are attached to the Complaint pursuant to the Proposal, including the very application in
18 dispute, the application containing the defendant's name, date of birth, social security number,
19 current address, employment information, etc. This disclosure has the potential to be intercepted
20 by someone other than the defendant and could lead to potential identity theft. Further, as noted
21 by the Maricopa County Justices of the Peace, this information will need to be carefully redacted
22 to ensure that there is no unintentional disclosure to a third party. All of this risk for what is likely
23 to be a case to proceed by default or a case to be settled by the parties is needless. The Proposal
24 provides no safeguards and unintentionally places those it intends to benefit at risk.
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27 ¹ Pursuant to A.R.S. § 33-1377(B) the Summons and Complaint may be posted on the door to the dwelling unit and mailed via
certified mail to the tenant's last known address. By posting documents with social security numbers and/or dates of birth,
the tenant runs the risk of a passerby grabbing the sensitive documents and using them for nefarious purposes.

1 c. THE PROPOSAL WILL INCREASE COSTS AND REDUCE THE
2 POTENTIAL FOR CURE.

3 Those attorneys that have been practicing in the area of landlord/tenant law for a
4 considerable period of time have been able to implement procedures and processes in their office
5 to help streamline the filing of eviction actions and minimize legal fees. The Proposal seeks to
6 change that process, fundamentally, and will inevitably result in an exponential increase in
7 attorneys' fees. While some may view that as an empty threat, the fact remains that there will be
8 considerable more time spent on each eviction action filed and all evidence will need to be reviewed
9 by an attorney and prepared for filing. Documents requiring redaction will need to be redacted,
10 color photos will need to be printed and bates stamped, and the tenant file scavenged to ensure that
11 all documents related to the lease are included in the court submission and all documents related
12 to the case, including potential documents needed based on anticipated defenses, will be gathered
13 and readied for filing. Disclosure of this kind is non-existent in any other area of law in Arizona
14 and will result in additional hours spent by an attorney reviewing a case before it is submitted. The
15 result will be an increase in attorney's fees that will ultimately be passed onto the defendant.

16 In addition to the increase in attorney's fees there will be an increase in fees related to the
17 service of process. Process servers will need to now be forced to serve ten to twenty times more
18 pages per case. This will result in an increase in costs per serve and will result in an increase in
19 costs associated with the certified mailing of the pleadings required by the Proposal.

20 As indicated above, the Proposal seeks to assist those defendants whom are in need of
21 assistance and identifies, in particular, those defendants on rent subsidies. Given this is their target
22 group to support, it is illogical that the Proposal would create such a burdensome disclosure
23 requirement that will result in additional costs for the defendant to pay in order cure the breach
24 and avoid the eviction. **While some may not find an additional \$100.00 overly burdensome,**
25 **someone on a rent subsidy likely will.** This Proposal will result in the increase in costs and
26 likely will result in an increase in those cases proceeding to judgment, resulting in additional
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1 defendants being evicted from their home as they are not able to meet the financial obligations of
2 the judgment obtained. This certainly is not just and should be a factor significantly considered
3 by the Court.

4 **d. SANCTIONS FOR VIOLATING THE RULES ARE SEVERE**

5 The Proposal seeks to penalize, severely, a landlord for failing to properly disclose all of the
6 documents required under the Proposal. The landlord could face the dismissal of the action or
7 exclusion of evidence not submitted in accordance with the proposed version of Rule 5(a), RPEA.
8 This change in the rule requires the landlord to know, with a degree of absolute certainty, all
9 documents that are needed to prosecute its eviction. The Proposal suggests that this is a task easily
10 accomplished but it is not. Defendants are not required to file an answer prior to the initial
11 hearing.² As there is no requirement to file an answer before the initial hearing, how can a landlord
12 know the response of the defendant and know what documents to use in the hearing without such
13 knowledge? The answer is clear, the landlord cannot know what he or she needs until the
14 defendant presents his or her defense. Only then will the landlord know what is in dispute and
15 what documents need to be produced in order to prosecute its claims. This has been the formula
16 for civil litigation for all practitioners of law for the past century. To now deviate from that formula
17 and require a landlord to know all that he or she needs to defeat any defenses possible to be raised
18 by his or her tenant is overly burdensome and likely to result in the overproductions of documents,
19 many of which irrelevant to the issues advanced in the Complaint, and an unnecessary increase in
20 costs and burden for all parties involved.

21
22 In addition to the overly burdensome disclosure rule, a landlord whom misjudges the case
23 and fails to consider every potential dispute and therefore identify every potential document that
24 could be introduced at trial will stand to have said document(s) precluded from the trial if it were
25 not properly disclosed at the inception of the eviction or worse, risk dismissal of the eviction

26
27 ² Rule 7, RPEA, provides “[o]n or before the initial return date, the defendant shall answer, indicating whether the defendant admits or denies the allegations of the complaint. If the defendant does not have sufficient information to determine whether or not an allegation of the complaint is true, the defendant shall so state. The defendant's answer shall also state in short and plain terms any defenses the defendant wishes to assert to the plaintiff's claims.”

1 action. This would even be the case for documents that are known but not yet available to the
2 landlord which would include, for example, fire department reports or police reports. While the
3 rule provides a good cause exception to the penalty, it provides no guidance of what that good
4 cause entails. The result of such a rule will be a propensity to exclude evidence or dismiss cases
5 not in compliance and will develop an inconsistent criteria for what constitutes good cause for a
6 failure to properly disclose the subject exhibit when the action was filed.

7 **e. NO RECIPROCAL DISCLOSURE**

8 Rule 10, RPEA, in its current form, provides disclosure requirements for either party upon
9 request. It is interesting the need for additional disclosures on the part of the landlord to be readily
10 identified by the proponent of the Proposal but the need for a reciprocal disclosure from the
11 defendant to the landlord not to be identified as necessary. The RPEA is the sole source of rules
12 for eviction actions.³ Nothing in the current version of Rule 10 nor the Proposal requires a
13 defendant to provide copies of all exhibits intended to be used at trial with their Answer. Only
14 upon request of the landlord would such a disclosure be required of the defendant. Absent a
15 request from the landlord for disclosure, a defendant would not be required to produce any
16 disclosure yet would be free to submit to the court any document he or she believes to support his
17 or her defense to the underlining allegations in the Complaint. Undersigned is unaware of any
18 other area of law that imposes such a one-sided disclosure requirement, yet alone one that severely
19 punishes a party forced to contemplate and speculate as to every conceivable piece of evidence
20 needed to prosecute its claims and refute the defenses of the defendant. Such a proposal suggests
21 an uneven playing field in an arena where all parties are supposed to be on the same level.

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26 ³ Rule 1, RP.E.A., provides: “[t]hese rules shall be known and cited as the Rules of Procedure for Eviction Actions (“RPEA”).
27 These rules shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions,
which are jointly referred to in these rules as “eviction actions.” For purposes of these rules, there shall be only one form of
action known as an “eviction action.” The Arizona Rules of Civil Procedure apply only when incorporated by reference in
these rules, except that Rule 80(c) shall apply in all courts and Rules 42.1 and 42.2 shall apply in the superior courts.”

1 **f. DUE PROCESS IS PROVIDED TO ALL DEFENDANTS**

2 The Proponents of the Proposal suggest that there are due process considerations that
3 warrant the Proposal's changes to the RPEA. The proponents ignore the procedural due process
4 safeguards already in place.

5 Pursuant to Rule 13, RPEA, the court is required to make the following findings:

- 6 1. Determine whether the service of the summons and complaint was proper and
7 timely, and whether the summons and complaint included all the information and
8 notice(s) required under Rule 5.
- 9 2. Determine whether the tenant or occupant of the premises received proper
10 termination notice if one was necessary, and was afforded any applicable opportunity
11 to cure. If the notice does not comply with the statute or is not properly served, the
12 court shall dismiss the action.
- 13 3. Determine whether the facts alleged, if proven, would be sufficient to determine
14 that plaintiff has a right of superior possession due to a material breach of the lease
15 agreement or for any other basis in law.
- 16 4. If it appears that a landlord has accepted a partial payment in a case claiming
17 nonpayment of rent under the Arizona Residential Landlord and Tenant Act, the court
18 shall inquire whether the landlord accepted the partial payment, and if so, can produce
19 a partial payment agreement and waiver signed by the defendant as required by the
20 statute. If the landlord is unable to prove that the waiver was signed, the court shall
21 dismiss the action; and
- 22 5. If the court determines that the rental property is subsidized, determine whether
23 there is unpaid rent that the tenant is obligated to pay as the tenant's portion of the rent.

24 Additionally, under Rule 10, RPEA, as it currently exists, a defendant may request
25 disclosures of majority of the documents that the Proposal seeks to require at the commencement
26 of the action. The proposal provides no analysis as to how this additional disclosure requirement
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1 at the commencement of the action will afford better due process for defendants. Ultimately, the
2 Proposal has no effect on due process. The same information will be communicated to the court
3 and the same information will be provided to those tenants whom contest their eviction and
4 request disclosure. There appears to be no tangible due process benefit to the Proposal.

5 **g. INCONSISTENCIES IN PROPOSAL**

6 The amendments to Rule 10(a) and 5(d) in the Proposal are not in harmony with one
7 another. The proposed version of Rule 5(d) requires that all documents related to the case be filed
8 with the complaint and provides for severe penalties if the disclosure is not made. Rule 10(a),
9 however, as proposed indicated that, upon request, the landlord shall provide the defendant with
10 “copies of any documents the party intends to introduce as an exhibit at trial that were not attached
11 to the complaint as required by Rule 5(d).” If Rule 5(d) as proposed requires **all** documents to be
12 filed with the complaint then what additional documents could Rule 10(a) concern? Is there a way
13 to not disclose certain documents at the inception of the case and later rectify that failure upon the
14 adverse party requesting a disclosure? The answer seems to be yes. Regardless, Rule 10(a) and
15 Rule 5(d) cannot be read in harmony.

16 **h. JUSTICES OF THE PEACE COUNTER-PROPOSAL**

17 While the AMA agrees with some of the of the concerns raised by comment filed by Justices
18 of the Peace Keith Russell, Gerald Williams, and Charles Adornetto (waste of resources, burdens
19 on court staff, and dissemination of confidential information) it disagrees with some of their
20 proposed solutions. AMA joins with the MHCA in its agreement that there is no issue with adding
21 language to the REIS informing tenants that, if they meet with an attorney, they should bring
22 copies of their lease and any notices issued by the landlord. However, the AMA disagrees with the
23 remaining suggestions as stated below.

24
25 With regards to the proposal that Rule 5(d), RPEA, be amended to require landlords to
26 give defendants legal advice in the complaint by advising the defendant as to the categories and
27 location of items discoverable that can be requested under Rule 10(a), RPEA, and how they may

1 be obtained. This is legal advice and the landlord should not be required to advise the defendant
2 as to the law. AMA agrees with the MHCA as to the potential violation of state law concerning
3 the prohibition on the court adopting a rule that requires a mandatory or technical form for
4 pleadings in an eviction action.

5 As for the proposal that the landlord identify what items of disclosure are available or
6 anticipated to be used, this proposal will not work for the same reasons articulated above that the
7 mandatory inclusion of these documents with the complaint will not work. The landlord will not
8 know all the documents needed to prosecute its case without first learning the defendant's position
9 to the case. Absent this information, any information to be provided by the landlord as to potential
10 exhibits would be incomplete and, therefore, meaningless.

11 Lastly, AMA sees no value in the proposed change to rule 5(1), RPEA. This cure language
12 is included in A.R.S. § 33-1368(B). There is no need to duplicate this disclosure.

13 **IV. CONCLUSION**

14 The Proposal has provided no evidence in support of its contention that these disclosure
15 rules are required. The comments thus far filed seem to uniformly that there are concerns about
16 the mass production of documents, the effect of said production on the court, and the risk posed
17 on defendants with the personal information so readily available to the public. The proposal seeks
18 to add disclosure requirements that are one-sided and burden a case load that is predominantly
19 resolved by default judgments. In the end, there is no tangible benefits only guaranteed burdens.
20 Burdens which defendants will assume in the end.

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22 RESPECTFULLY SUBMITTED THIS DATE, the 1st of May 2019

23 **LAW OFFICES OF SCOTT M. CLARK, P.C.**

24
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2 **FILING AND MAILING DECLARATION**

- 3 1. An electronic copy of this Comment in two formats was filed with the Clerk of the Supreme Court
4 of Arizona.
- 5 2. A copy was mailed and emailed to the following individual(s):
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By /s/ Christopher R. Walker on 5-1-2019.